Supreme Court, U.S.
FILED

97 . 2 4 4 JUL 1 1 1997

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

1996 Term

Phonometrics, Inc.,

Petitioner,

v.

Radisson Hotels International, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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31pp

QUESTIONS PRESENTED FOR REVIEW

1. May a district judge, in correcting a mistake by the court, reopen the case for the purpose of allowing a party thirty days in which to appeal a ruling of the court?

2. Does *Browder v. Dep't of Corrections of Ill.*, 434 U.S. 257 (1978) bar a district court from reopening a case under Fed. R. Civ. P 60(b) for the purpose of allowing a party to appeal?

LIST OF PARTIES AND CERTIFICATE OF INTEREST

Counsel for Petitioner, Phonometrics, Inc., certifies the following:

1. The caption contains all parties before the Court.

2. The full name of every party represented by me is: Phonometrics, Inc.

3. There is no real party in interest.

4. There are no parent companies, subsidiaries or affiliates that have issued shares to the public of the party represented by me.

5. The names of all law firms and partners and associates that appeared for the party now represented by me in the trial court or are expected to appear in this Court are: BRYAN HINSHAW COHEN & BARNET, P.C., John P. Sutton and Lance D. Reich, and Michael Hursey, P.A.

Dated: _____ BRYAN HINSHAW COHEN & BARNET, P.C.

By: _____
John P. Sutton, Esq.
Attorneys for Petitioner
Phonometrics, Inc.

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BASIS FOR JURISDICTION

On April 7, 1997, the Court of Appeals for the Federal Circuit granted a motion filed by Respondent Radisson Hotels International, Inc. to dismiss the appeal filed by Petitioner Phonometrics, Inc.

On May 2, 1997, the Federal Circuit adhered to its prior decision on a motion for reconsideration, holding that it lacked jurisdiction to decide an appeal in a case reopened by the district court for the express purpose of allowing an appeal.

This Court may consider this Petition under 28 U.S.C. § 1254(1), to review the decree of the Federal Circuit. This Court should review the Federal Circuit decision because it has so far departed from the accepted and usual course of judicial proceedings on appeal as to call for an exercise of this Court's supervisory power (Supreme Court Rule 10(a)).

28 U.S.C. § 1295(a)(1) reads in relevant part:

> "(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction - (1) of an appeal from a final decision of a district court...if the jurisdiction of that court was based, in whole or in part on section [28 U.S.C.] 1338."

28 U.S.C. § 1338(a) reads in relevant part:

> "(a) the district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents"

STATEMENT OF THE CASE

This is a patent infringement case brought in the United States District Court for the Southern District of Florida. A motion for leave to amend the complaint was denied by the district court, and Petitioner seeks to have that decision reviewed for an abuse of discretion by the Federal Circuit. The Federal Circuit has refused to review the appeal on the grounds it lacks jurisdiction, and it has dismissed the appeal.

PROCEDURAL HISTORY

Phonometrics has a patent on call cost accounting equipment for allowing hotels to charge guests who make telephone calls from their rooms. The patented equipment allows the hotel to record with the room charge the charges for each call immediately after the call is concluded. A generation ago, the hotel operator had to call the AT&T operator to obtain "time & charges" to be entered in the guest's bill. Now, as a result of the patented invention, a record is generated automatically, substantially instantaneously after the guest hangs up.

Phonometrics has sued most of the large hotel chains for patent infringement, including Respondent Radisson Hotels International, Inc. ("Radisson"), the name of the hotel chain listed in industry directories. Radisson responded to the complaint with a motion to dismiss, pointing out that the wrong defendants were sued for use of call cost accounting equipment in "Radisson" brand hotels. According to Radisson, there are three different types of "Radisson" hotels.

First, there are the wholly owned "Radisson" hotels that have cost accounting equipment selected and paid for by a company related to the named defendant. Radisson did not identify the related company, but its identity should be easy to obtain. Second, there are "Radisson" hotels that are not owned, but are managed by the related company. In managing the hotels, presumably the manager selects and controls the telephone equipment used, including call accounting equipment. It is not clear whether the same or another related company of Radisson manages the hotels.

The third category is franchised "Radisson" hotels, owned and managed by entities other than Radisson and its related companies. All other franchisors of hotels that Phonometrics has seen in discovery provide that the franchisor participates in the installation and controls the uniformity of equipment in all franchised hotels so that there is no untried and untested cost accounting equipment in any franchised hotels. However, Radisson swore in declarations that franchised "Radisson" hotels could use any call accounting equipment the franchisee wanted, whether tried and true or otherwise.

Phonometrics took Radisson at its word, and sought leave to amend the complaint to name as defendants the franchisees who were allegedly solely responsible for call accounting equipment used in "Radisson" franchised hotels. Leave to amend was denied, and Phonometrics seeks to have the denial reversed as an abuse of discretion.

There were three mistakes committed in the district court that resulted in denial of the appeal as of right to the Federal Circuit. The three mistakes are all procedural, and cannot be construed as jurisdictional under any stretch of the imagination.

1. THE FIRST MISTAKE

The first mistake was to deny leave to amend because the case was assumed to be closed. The case had indeed been closed, because counsel for Phonometrics had failed to respond at all to a Motion for Summary Judgment filed by Radisson under Fed. R. Civ. P. 56. Michael Hursey, a sole practitioner in Florida, had filed the patent infringement case against Radisson, but then became involved in a long criminal trial over many months, and was unable to attend to the patent infringement case. Radisson filed a Motion for Summary Judgment July 31, 1995. On November 27, 1995, the district judge granted the motion and entered judgment in favor of Radisson. The only reason given was that "[t]o date, plaintiff has not responded" (A8). He ordered that the "Clerk of the Court shall CLOSE this case." (A8)

Three days later, on November 30, 1995, attorney Hursey filed a MOTION TO WITHDRAW AS COUNSEL OF RECORD. He asked "that this Court allow plaintiff 30 days to secure new counsel in this matter, and stay

this matter during that period" (A15). That Motion was granted on December 11, 1995, thereby reopening the closed case (A10).

During the thirty days that the case was reopened and stayed, Phonometrics secured new counsel. New counsel filed a motion for leave to amend to add franchisees and others responsible for call accounting equipment in "Radisson" hotels on December 22, 1995, well within the 30 day stay in the reopened case.

Six months passed, during which considerable activity in other Phonometrics cases took place, but none in the Radisson case. On June 13, 1996, the district court made its first mistake in this case. It denied leave to amend for the sole reason that the case was "closed 11/95." (A11). A rubber stamp on the first page of the Phonometrics motion, with an "X" in the box marked "Denied" spelled the finality of the Rule 15 motion, even though Fed. R. Civ. P. 15 (a) states that "leave shall be freely granted when justice so requires." Such a motion in a reopened case, for the sole purpose of sorting out the proper defendants who operate under the "Radisson" trademark, would seem to be in the interests of justice.

2. THE SECOND MISTAKE

Calling a reopened case a closed case was the first mistake. The second mistake was the failure of the Court to notify either party that the six-month-old motion had been denied. Phonometrics was unable to appeal the denial of leave to amend simply because it had no notice of the denial for another four months, when the district court sent a copy of the "denied" stamp to Phonometrics. Phonometrics had filed a Motion to Transfer in the Judicial Panel on Multi-District Litigation. Before oral argument, the clerk of the panel called counsel for Petitioner to say that the on-line docket sheet for the Radisson case showed that it had been dismissed. When Phonometrics received a copy of the "Denied" stamp, it immediately filed a Motion for Relief under Fed. R. Civ. P. 60 (b) in the district court to correct the two mistakes of holding a reopened case to be closed, and not notifying either party that the leave to amend had been denied (A14).

The district court granted Rule 60 relief only as to the second mistake, not the first. It refused "to revisit its June 13 Order" denying leave to amend in a

closed case (A12). However, it did grant relief to allow an appeal to be filed. The district court granted Phonometrics "thirty (30) days from receipt of this Order in which to appeal the Court's Order of June 13" (A13).

3. THE THIRD MISTAKE

Phonometrics duly filed its notice of appeal in the district court within thirty days, to allow an appeal to the Federal Circuit under 28 U.S.C. § 1295(a)(1). When it got there, and had fully briefed the case on the merits, Radisson filed a Motion to Dismiss the appeal, rather than respond on the merits. Accordingly, it alleged that the appeal was not timely, and the Federal Circuit had no jurisdiction to hear the appeal on the merits. The reason advanced was that no appeal was filed from the November 29, 1995 order granting summary judgment. Because that order was in the nature of a default judgment, and did not purport to address the merits of the case, the proper course of action is to set aside the default, in order to advance the case to a decision on the merits.

Attorney Hursey had the "default" judgment on summary judgment set aside as part of his motion to withdraw. The grant of the motion to withdraw was not conditional on the filing of an appeal. A motion under Rule 15 to name the proper defendants who are responsible for the use of infringing equipment in "Radisson" hotels was clearly the avenue to advance the case to a decision on the merits. The filing of an appeal would have been futile, since attorney Hursey had not responded at all to the motion under Rule 56. If there is no record, there are no grounds to appeal.

The district court did allow Phonometrics to appeal the denial of leave to amend. Rather than appeal an order on a motion it failed to contest, Petitioner chose to seek leave to amend to name the proper "Radisson" defendants. The district judge denied leave to amend, but granted leave to appeal that Order (A12 - A13).

Petitioner duly filed its appeal, and fully briefed the case on the merits. Apparently sensing that its position on the merits was weak, Radisson filed a motion to dismiss the appeal on jurisdictional grounds, without addressing the merits. The Federal Circuit granted the Motion to Dismiss the Appeal (A1 - A4).

ARGUMENT

This Petition is limited solely to the issue of whether the Court of Appeals may review the refusal of the district court to grant leave to amend the complaint. The district court denied the motion for leave to amend (A11) giving as the sole reason the fact that the case had been closed six months earlier. The truth is that the closed case had been reopened a few days after the case was closed (A10) to allow counsel to withdraw and new counsel to appear. At the time of the denial of leave to amend, the case was not closed, but had been reopened, and the motion for leave to amend was filed during the period the case was reopened.

> "Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962) *citing Conley v. Gibson*, 355 U.S. 41, 48 (1957).

The Court of Appeals held that it lacked jurisdiction to hear the appeal because Phonometrics "did not file a notice of appeal of the November 29 Summary Judgment order" (A2 - A3). Further, as to the appeal of the denial of the motion for leave to amend, the Federal Circuit held that Fed. R. App. P. 4(a)(6) allows only 14 days for appeal when notice of judgment has not been received (A4). The district court gave 30 days in its relief under Rule 60(b), sixteen days more than it was allowed to give. The difference between 14 and 30 days to appeal is "jurisdictional and may not be waived by a district court" (A4).

The flaw in the Federal Circuit reasoning is that relief was granted by the district court under Fed. R. Civ. P. 60(b), and not under Fed. R. App. P. 4(a)(6). No one raised any issue about appellate Rule 4 until the Motion to Dismiss in the Federal Circuit. Radisson argued that the district court lacked the power to grant relief under Fed. R. Civ. P 60(b).

The Federal Circuit cited *Browder v. Dep't of Corrections*, 434 U.S. 257 (1978), for the proposition that the district court has no jurisdiction to reopen this case when attorney Hursey withdrew. *Browder* has no such holding. *Browder* was a habeas corpus case in which the Department of Corrections did not file an appeal within 30 days after an entry of judgment on October 8, 1975. The reason no appeal was filed was that the government did not believe that Fed. R. App. P. 4 applied to habeas corpus proceedings. The government insisted that the October 8 order was not final, so it had no need to appeal. The majority held that the order was final and failure to file a timely appeal meant that the lower court lost jurisdiction over the case, and the appellate court did not acquire jurisdiction.

The concurring opinion by Justice Blackmun pointed out that Rule 4 did not allow an untimely appeal, but Fed. R. Civ. P 60(b) would allow a district court to grant relief if the provisions on mistake and the like were met. He said "respondent's position might be sustained under Fed. Rule Civ. Proc. 60 (b)(1) or (6) ... as an order reinstating judgment" (434 U.S. at 272). Reflecting his experience on a court of appeals, he said: "I would not decline to treat the matter under Rule 60 (b) merely because respondent did not label his initial motion for a new evidentiary hearing as a 'Rule 60(b) motion,' for that would exalt nomenclature over substance." (Id.)

The majority in *Browder*, however, did not consider the impact of Rule 60, because "[r]espondent has insisted throughout this litigation that his motion ... was not based on Rule 60 (b)" (footnote 8, 434 U.S. at 264).

In the present case, the Federal Circuit held that the Phonometrics motion for relief, which was expressly grounded on Rule 60 (b) (A14) was "not entirely clear" but appeared to be that "(1) the district court had the power under Fed. R. Civ. P. 60(b) 'to relieve Phonometrics from the duty to appeal an order it never received' and (2) the district court 'had the jurisdictional power to give relief from its order where justice so requires'" (A3). This argument was rejected because the "periods set forth in Rule 4(a) are jurisdictional and may not be waived by a district court" (A4). *Browder* is cited as support for that statement, even though *Browder* expressly said, in both the majority and concurring opinions, that Rule 60(b) allows a district court that makes a mistake to correct it, notwithstanding appellate Rule 4.

On reconsideration, the Federal Circuit remained of the view that the district court could not grant relief under Rule 60(b), but even if it could reopen the case under Rule 4(a)(6), it lacked the power to grant a thirty day period in which to appeal. "Fed. R. App. P. 4(a)(6), not Fed. R. Civ. P. 60(b) applies to motions to reopen the time to appeal" (A7). Phonometrics filed its notice of appeal in a good faith reliance on the district court's order that gave thirty days. The Federal Circuit held that the district judge lacked jurisdiction to give any more than 14 days under Rule 4(a)(6). The 30 days was given as relief from the court's mistake under Rule 60 (b) (A14), and did not purport to be under appellate Rule 4. Denying the district court the authority to grant relief under Rule 60(b) is directly contrary to *Browder*. Phonometrics falls squarely within the exception to the *Browder* rule that an untimely appeal under Rule 4 is jurisdictional and cannot be permitted. The exception in *Browder* is that a district court can grant relief from its orders under Rule 60(b), which is what happened here. In *Browder*, the government insisted that it did not fall within the exception that Phonometrics has consistently urged.

Phonometrics has never asked the Federal Circuit to "excuse the late filing of the notice of appeal" (A7). Rather, it simply wants its appeal heard on the merits. The district judge corrected its mistake of not sending either party a copy of the order denying leave to amend, something entirely within his discretion under Rule 60(b). It is error to say that the district court lacked authority to correct its mistake because Rule 4 is "jurisdictional." To call the Rule 60(b) motion in the District Court a motion in the Federal Circuit to "excuse the late filing of the notice of appeal" (A7) is to rewrite history. Petitioner never filed any motion under appellate Rule 4 in the Federal Circuit. This is worse than "exalt[ing] nomenclature over substance" (*Browder* 434 U.S. at 272); it is a mischaracterization of what actually happened. Relief was granted under Rule 60(b), exactly as might have occurred in *Browder* but for the refusal of respondent there to so move. Whether or not appellate Rule 4 is "jurisdictional" or not is utterly beside the point of this case.

The Federal Circuit quotes Fed. R. App. P. 1(a) for support that it is "most untenable" to assert that the district court could correct its mistake (A6). According to the Federal Circuit, the appellate rules "cover all steps of the appellate process" (A6) and limit the jurisdiction of the district court. The Federal Circuit did not refer to appellate Rule 1(b).

Fed. R. App. P. 1(b) requires that the rules "shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law." The Federal Circuit has jurisdiction over this patent infringement case under 28 U.S.C. § 1295(a)(1). It has decided to exclude from its jurisdiction this case for the trivial reason that the notice of appeal was filed more than 14 days, but less than thirty days after the district judge granted Rule 60(b) relief. This case should be remanded to the Federal Circuit for a decision on the merits.

This case should not turn on whether an appeal must be filed in 14 days or 30 days. The district court granted 30 days under Rule 60(b), and that grant was not an abuse of discretion. Thirty days is the normal time period for filing an appeal in a reopened case under Fed. R. App. P. 4(a)(1), so it can hardly be an abuse of discretion to grant exactly that length of time in this reopened case.

This Court recently showed deference to the Federal Circuit in matters of patent law, its specialty. *Warner Jenkinson Co. v. Hilton Davis Chemical Co.*, U.S. 117 S. Ct. 1040 (1997) Here, however, no decision involving patent law has been reached. It is a garden variety dispute as to whether a plaintiff can amend a complaint to include the real parties in interest when it is revealed that the named defendant is a related but not the primary defendant or defendants. Whether leave to amend should be freely granted is the issue; not whether an appeal must be filed in 14 days or 30 days in a reopened case.

The Federal Circuit apparently does not want to review the clearly erroneous decision of the district court, and has refused to do so. This Court should exercise its supervision of this procedural matter, which has nothing to do with the special expertise of the Federal Circuit in patent matters. It is important that a specialist court must not go off in its own direction, unsupervised by this Court, merely because patent law is arcane. An injustice has been done, because the Federal Rules of Appellate Procedure should not be "construed to ...limit the jurisdiction of the courts of appeal," including the Federal Circuit (Fed. R. App. P. 1(b)).

CONCLUSION

The Petition should be granted, and the case should be remanded forthwith for a decision on the merits of the motion for leave to amend.

Respectfully submitted,

Dated: _____

_____

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NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

97-1155

PHONOMETRICS, INC.

Plaintiff-Appellant,

v.

RADISSON HOTELS INTERNATIONAL, INC.

Defendant-Appellee.

ON MOTION

Before RICH, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and RADER, Circuit Judge.

RICH, Circuit Judge.

ORDER

Radisson Hotels International, Inc. moves to dismiss Phonometrics, Inc.'s appeal. Phonometrics opposes.

BACKGROUND

Phonometrics filed a patent infringement action against Radisson Hotels in 1994. In July 1995, Radisson Hotels filed a motion for summary judgment, which Phonometrics did not oppose. On November 29, 1995, the United States District Court for the Southern District of Florida entered an order granting summary judgment for Radisson Hotels and directing that the case

be "closed." On December 4, 1995, counsel for Phonometrics filed a motion to withdraw from representation, requesting that Phonometrics be allowed 30 days to secure new counsel and that the district court "stay this matter during that period." In an order dated December 11, 1995, the district court granted the motion to withdraw and ordered that the case be "stayed during this 30-day period." New counsel entered an appearance two days later. On December 26, 1995, Phonometrics filed a motion for leave to file an amended complaint, to reinstate the case, and to add 163 defendants. Phonometrics, however, did not file a notice of appeal of the November 29 summary judgment order.

In an order dated June 13, 1996, the district court denied Phonometrics' motion for leave to amend. A copy of Phonometrics' motion bears a stamp indicating that it was denied because the case had been closed in November 1995. Neither party received a copy of the order. Phonometrics states that it did not have notice of the disposition of its motion to amend until September 15, 1996, when it was so informed by the clerk of the Panel on Multidistrict Litigation. On October 21, 1996, some four months after entry of the June 13 order, Phonometrics filed a motion in district court "for relief" from the order, contending that it never received a copy of that order because, if it had, it would have filed a notice of appeal. In an order dated November 7, 1996, the district court granted Phonometrics' motion in part, stating that Phonometrics

> claims that by error it failed to receive a copy of the Order, and the Court finds this sufficient cause to excuse plaintiff's failure to appeal within the time provided by the rules. Accordingly, the June 13 order will stand, and plaintiff will be allowed thirty days from receipt of this order to appeal it.

Phonometrics filed a notice of appeal 30 days later on December 6, 1996.

DISCUSSION

There is no question that Phonometrics did not timely file a notice of appeal of the November 29, 1995 summary judgment order. See Fed. R. App. P. 4(a)(1) (in civil cases not involving the United States, a notice of appeal must be filed within 30 days of entry of the judgment). Nor did Phonometrics interpose any postjudgment motion that tolled the time for filing a notice of appeal of that order. See Fed. R. App. P. 4(a)(4) (specifying types of postjudgment motions that toll the time for filing a notice of appeal). Phonometrics, therefore, did not appeal and may not seek review of the November 29, 1995 order. See Browder v. Director, Dep't of Corrections of Ill., 434 U.S. 257, 264 (1978) (the timely filing of a notice of appeal is mandatory and jurisdictional).

The question before us is whether Phonometrics appealed the June 13, 1996 order denying its motion to amend the complaint. Radisson Hotel argues the because Phonometrics did not timely appeal the June 13 order pursuant to the requirements of Fed. R. App. P. 4(a)(6), Phonometrics' appeal must be dismissed. Phonometrics' arguments are not entirely clear, but it appears to be arguing that this court has jurisdiction over its appeal because (1) the district court had the power under Fed. R. Civ. P. 60(b) "to relieve Phonometrics from the duty to appeal an order it never received" and (2) the district court "had the jurisdictional power to give relief from its order where justice so requires."

Pursuant to Fed. R. App. P. 4(a)(6), if a district court finds that a party did not receive notice of entry of judgment within 21 days of the day of its entry and "no party would be prejudiced," the district court may "upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days . . . ." Fed. R. App. P. 4(a)(6) (emphasis added). Here, according to a declaration of Phonometrics' counsel

at the time, Phonometrics learned of the June 13 order on September 15. Phonometrics, however, waited 36 days to file a motion to reopen. Although the district court granted the motion to reopen, it had no authority to do so because Phonometrics filed its motion more than seven days after it received notice of the June 13 order. See, e.g., Martinez v. Hoke, 38 F.3d 655, 656-57 (2d Cir. 1994); Vahan V. Shalala, 30 F.3d 102, 103 (10th Cir. 1994). Moreover, assuming that the district court properly reopened the case under Rule 4(a)(6), Phonometrics did not file its notice of appeal within the prescribed 14-day period. The periods set forth in Rule 4(a) are jurisdictional and may not be waived by a district court. See Browder, 434 U.S. at 264.

Accordingly,

IT IS ORDERED THAT

(1) Radisson's motion to dismiss is granted.
(2) The parties shall bear their own costs.

FOR THE COURT

Apr -7 1997
Date

/s/Giles S. Rich
Giles S. Rich
Circuit Judge

ISSUED AS A MANDATE: APR -7 1997

cc: J. Rodman Steele, Jr., Esq.
John P. Sutton, Esq.

s11

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

97-1155

PHONOMETRICS, INC.

Plaintiff-Appellant,

v.

RADISSON HOTELS INTERNATIONAL, INC.

Defendant-Appellee.

ON MOTION

Before RICH, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and RADER, Circuit Judge.

RICH, Circuit Judge.

ORDER

Phonometrics, Inc. submits a "petition for rehearing" that the court treats as a motion for reconsideration, filed out of time, of the court's April 7, 1997 order that dismissed Phonometrics' appeal for lack of jurisdiction.

Phonometrics' principal, and most untenable, contention is that the Federal Rules of Appellate Procedure do not govern the procedure for an appeal from a district court. The Federal Rules of Appellate Procedure cover all steps of the appellate process, regardless of whether those steps take place in an appellate court or in a district court. See Fed. R. App. P. 1(a) ("**Scope of Rules**. These rules govern procedure in appeals to United States courts of

appeals from the United States district courts . . . .") and Advisory Committee notes. Phonometrics also renews its argument that the district court could extend the time for Phonometrics to appeal under Fed. R. Civ. P. 60(b). As we indicated in our earlier order, Fed. R. App. P. 4(a)(6), not Fed. R. Civ. P. 60(b) applies to motions to reopen the time to appeal.

In essence, Phonometrics argues that this court should excuse the late filing of the notice of appeal. As the court stated in the April 7 order, assuming that this district court properly reopened the case under Rule 4(a)(6), Phonometrics did not file its notice of appeal within the prescribed 14-day period. The periods set forth in Rule 4(a) are jurisdictional and may not be waived by this court or a district court. See Browder v. Director of Dep't of Corrections of Ill., 434 U.S. 256, 264 (1978), Fed. R. App. P. 26(b) ("the [appellate] court may not enlarge the time for filing a notice of appeal").

Accordingly,

IT IS ORDERED THAT

Phonometrics' motion for reconsideration is denied.

FOR THE COURT

May -2 1997
Date

/s/Giles S. Rich
Giles S. Rich
Circuit Judge

cc: J. Rodman Steele, Jr., Esq.
John P. Sutton, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-6510-CIV-RYSKAMP

PHONOMETRICS, INC.,
a Florida Corporation,

Plaintiff,

vs.

RADISSON HOTELS
INTERNATIONAL, INC.,
a Delaware corporation,

Defendant.
_____/

SUMMARY FINAL JUDGMENT

THIS CAUSE came before the Court upon defendant's Motion for Summary Judgment (DE 30), filed July 31, 1995. To date, plaintiff has not responded.

THE COURT has considered the Motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the said Motion be, and hereby is GRANTED. Final judgment is entered in favor of defendant Radisson with costs taxable against plaintiff Phonometrics. The Clerk of the Court shall CLOSE this case and DENY all pending Motions as MOOT.

DONE AND ORDERED in chambers at West Palm Beach, Florida, this 27 day of November, 1995.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:
J. Rodman Steele, Jr., Esq.
Michael Hursey, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PHONOMETRICS, INC., CASE NO. 94-6510-CIV-RYSKAMP
a Florida corporation,

Plaintiff,

v.

RADISSON HOTELS
INTERNATIONAL, INC.
a Delaware corporation,

Defendant.
_____/

ORDER

THIS CAUSE having come before the Court on Michael Hursey, P.A.'s Motion to Withdraw As Counsel of Record for Plaintiff PHONOMETRICS, INC., and the Court having considered the Motion, it is hereby

ORDERED AND ADJUDGED that said Motion is GRANTED. Plaintiff PHONOMETRICS, INC. shall have 30 days from the date of this Order within which to secure new counsel.

IT IS FURTHER ORDERED AND ADJUDGED that this case shall be stayed during this 30-day period.

DONE AND ORDERED at WPB, Florida, this 11 day of December, 1995.

/s/Kenneth L. Ryskamp
U.S. DISTRICT COURT JUDGE

Copies Furnished:
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PHONOMETRICS, INC., a Florida corporation,	)	CASE NO. 94-6510-CIV-RYSKAMP
Plaintiff,	)	**ORDER**
v.	)	Granted Denied X Comments: Case closed 11/95
RADISSON HOTELS INTERNATIONAL, INC. a Delaware corporation,	)	/s/ Kenneth L. Ryskamp KENNETH L. RYSKAMP U.S.District Judge
Defendant.	)	Date: 6/13/96

MOTION FOR LEAVE TO AMEND COMPLAINT AND TO ADD A DEFENDANT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-6510-CIV-RYSKAMP

PHONOMETRICS, INC.,
a Florida Corporation,

Plaintiff,

vs.

RADISSON HOTELS
INTERNATIONAL, INC.,
a Delaware corporation,

Defendant.
_____/

ORDER GRANTING LEAVE TO APPEAL UNTIMELY

THIS CAUSE came before the Court upon plaintiff's Motion for Relief from Order Denying Leave to Amend (**DE 51**), filed October 21, 1996. Defendant has responded in opposition, and plaintiff has replied.

Plaintiff's motion requests that this Court revisit its Order of June 13, 1996, denying Plaintiff leave to amend the Complaint. Plaintiff claims, by affidavit, never to have received the order. Plaintiff further claims that if it had received the Order, it would have appealed to the Federal Circuit in a timely manner. Now Plaintiff would have the Court reopen the file, and permit this case to be transferred to the Judicial Panel on Multidistrict Litigation, if that body will assume jurisdiction.

The Court sees no reason to revisit its June 13 Order. Plaintiff claims that by error it failed to receive a copy of the

Order, and the Court finds this sufficient cause to excuse plaintiff's failure to appeal within the time provided by the rules. Accordingly, the June 13 Order will stand, and plaintiff will be allowed thirty days from receipt of this Order to appeal it.

The Court has considered the Motion, and the pertinent positions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that plaintiff's Motion for Relief from Order Denying Leave to Amend (**DE 51**) be, and the same is hereby **GRANTED IN PART**. Plaintiff shall have thirty (30) days from receipt of this Order in which to appeal the Court's Order of June 13.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 7 day of November, 1996.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:
Robert J. Sacco, Esq.
Lance D. Reich, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PHONOMETRICS, INC., CASE NO. 94-6510-CIV-RYSKAMP
a Florida corporation,

Plaintiff,

v.

RADISSON HOTELS
INTERNATIONAL, INC.
a Delaware corporation,

Defendant.
_____/

PLAINTIFF'S MOTION FOR RELIEF OF ORDER DENYING LEAVE TO AMEND

Plaintiff Phonometrics, Inc. ("Phonometrics"), hereby moves this Court, pursuant to Fed. R. Civ. P. 60(b)(1) to reopen this case to be transferred pursuant to 28 U.S.C. Sec. 1407 or, in the alternative, for leave to appeal, and grounds therefor states:

1. Defendant Radisson Hotels International, Inc., ("Radisson") moved for summary judgment on July 31, 1995.

2. The Court granted Radisson's motion for summary judgment as unopposed on November 27, 1995.

3. Phonometrics previous counsel Hursey moved to withdraw as counsel for Phonometrics on November 30, 1995. Declaration of Reich, para. 4.

4. The Court granted Hursey's motion to withdraw as counsel on or about December 11, 1995. Declaration of Reich, para. 5.

5. Current counsel made his notice of appearance on December 12, 1995. Declaration of Reich, para. 6.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PHONOMETRICS, INC., CASE NO. 94-6510-CIV-RYSKAMP
a Florida corporation,

Plaintiff,

v.

RADISSON HOTELS
INTERNATIONAL, INC.
a Delaware corporation,

Defendant.
_____/

MOTION TO WITHDRAW AS COUNSEL OF RECORD

COMES NOW Michael Hursey, P.A., and moves this Court for permission to withdraw as counsel of record and Plaintiff PHONOMETRICS, INC., and as grounds therefore would state:

1. Irreconcilable differences have arisen between undersigned counsel and the principals of Phonometrics, Inc., which make it impossible to maintain the attorney/client relationship. These differences also severely impede the day-to-day overall decisions that must be made by Plaintiff to litigate this case.

2. Counsel would further ask that this Court allow Plaintiff 30 days to secure new counsel in this matter, and stay this matter during that period.

3. The defendant herein would not be prejudiced by the granting of this request.

WHEREFORE, for the foregoing reasons, counsel prays that this Court will grant his Motion to Withdraw.

Respectfully submitted,

MICHAEL HURSEY, P.A.
One River Plaza, Suite 701
305 South Andrews Avenue
Fort Lauderdale, FL 33301
Telephone: (954) 779-1880
Facsimile: (954) 779-7980

By: /s/Michael Hursey
MICHAEL HURSEY
Florida Bar No. 457698

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Facsimile and U.S. Mail to Phonometrics, Inc., c/o Lawrence Reich, 951 Lyons Road #6108, Coconut Creek, FL 33063, Mark Pinchasik, and Mitch Yelen, 3225 Aviation Avenue, Suite 500, Coconut Grove, FL 33133 and the attached list of counsel this 30 day of November, 1995.

/s/ Michael Hursey
MICHAEL HURSEY